Supreme Court, U. S.
FILED

**IN THE**

# Supreme Court of the United States

October Term, 1975

No. 75-481

NATHAN PENDLETON, *et al.*,

*Appellants,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Appellee.*

**ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE STATE OF CALIFORNIA.**

## JURISDICTIONAL STATEMENT

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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October Term, 1975

**No.** .....

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**NATHAN PENDLETON,** *et al.*,

*Appellants,*

*vs.*

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

*Appellee,*

**ON APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF ORANGE, STATE OF CALIFORNIA.**

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# JURISDICTIONAL STATEMENT

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Appellants appeal from the judgment of the Appellate Department of the Superior Court of the State of California, for the County of Orange, entered on March 12, 1975,[1] denying their Petition for Rehearing, etc., after that court's affirmance on March 4, 1975, of their judgments of conviction for distributing obscene matter in violation of California Penal Code Section 311.2.

This case presents substantial federal constitutional questions and is within the appellate jurisdiction of the Supreme Court of the United States.

## OPINIONS BELOW

Neither the Municipal Court, where appellants were tried, nor the Appellate Department of the Superior Court, which affirmed appellants' judgments of conviction, published any opinions regarding this case. A copy of the order of the Appellate Department of the Superior Court filed March 4, 1975, affirming the judgments of conviction entered in the Municipal Court, is attached hereto as Appendix A. A copy of the Minute Order of the Appellate Department of the Superior Court entered March 12, 1975, denying Petition for Rehearing, etc., is attached hereto as Appendix B.

## JURISDICTION

Appellants were prosecuted for misdemeanor violations

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[1]This Statement is not timely. An application for permission to file after the expiration of the allotted time, along with supporting affidavits, is being filed herewith.

of California Penal Code Section 311.2, which prohibits the distribution of obscenity. The judgment of the Appellate Department of the Superior Court of the State of California, for the County of Orange, denying appellants' Petition for Rehearing, etc., was entered on March 12, 1975, and a Notice of Appeal was filed in the Municipal Court of the Central Orange County Judicial District on April 22, 1975. The jurisdiction of the Supreme Court to review this decision[2] by appeal is conferred by Title 28, U S.C., Section 1257(2). Cases which sustain the jurisdiction of the Supreme Court to review this judgment on appeal are:

*Chicago Police Department vs. Mosley*, 408 U.S. 92 (1972);
*Mayer vs. Chicago*, 404 U.S. 189 (1971); and
*Miller vs. California*, 413 U.S. 15 (1973).

## QUESTIONS PRESENTED

**1. May a penal statute which prohibits the distribution of obscenity contain an exception which provides that the statute "shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed," without denying to other similarly situated persons, such as appellant bookstore clerks, the equal protection of the law?**

**2. Is a state constitutional provision requiring written appellate opinions after appeals to the state's courts of appeal**

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[2]The Appellate Department is the highest court in which decision can be had. *Talley vs. California*, 362 U.S.60, 62 (1960).

**and Supreme Court but not after appeals to the Appellate Department of that state's Superior Court consistent with the equal protection clause of the Fourteenth Amendment?**

**3. Does California Penal Code Section 311.2—the California obscenity statute, which does not, on its face, set forth specific acts which cannot be portrayed and has not been authoritatively construed to do so—violate the First and Fourteenth Amendments of the United States Constitution?**

## STATUTES INVOLVED

California Penal Code Section 311.2 and California Constitution Article VI, Section 14, are set forth as Appendix C hereof.

## STATEMENT OF THE CASE

Appellants were charged, in the Municipal Court of the Central Orange County Judicial District, with violations of California Penal Code Section 311.2. Prior to trial, appellants filed a Demurrer and Motion to Dismiss the Complaint against them on the ground, *inter alia,* that California Penal Code Section 311.2 is unconstitutional in that it violates the First and Fourteenth Amendments of the United States Constitution. Appellants' demurrer was overruled and the motion to dismiss was denied.

The issues raised by appellants prior to trial were urged as grounds for reversal in the Appellate Department of the Superior Court in appellants' brief before that court. Appellants' judgments of conviction were affirmed without

opinion by the Appellate Department, which thereby rejected appellants' contentions regarding the constitutionality of Penal Code Section 311.2.

After the decision of the Appellate Department, appellants petitioned for rehearing, urging, *inter alia*, that they were denied equal protection of the law by the failure of the Appellate Department to give an opinion in their case. This contention was rejected by the Appellate Department, which summarily denied appellants' Petition for Rehearing.

## THE QUESTIONS ARE SUBSTANTIAL

### Introduction

The issues involved in this appeal fall into two general areas: (1) Failure of the State of California, in its Penal Code and Constitution, to afford similarly situated classes of persons equal protection and procedures; and (2) Its failure to meet the requirements of the First Amendment, as set forth in *Miller vs. California*, 413 U.S. 15 (1973), that obscenity statutes, as written or construed, specifically set forth the act or conduct which may not be depicted.

### The Equal Protection Issues

Appellants' first contention regarding the denial of equal protection deals with California Penal Code Section 311.2. That section makes it unlawful for any person to deal in obscene materials, bring those materials into the state for sale or distribution, to possess, prepare, publish

or print those materials with intent to distribute them or exhibit them to others; to offer to distribute, distribute, or exhibit those materials to others. Section 311.2(b), however, makes an exception to the general rule of Section 311.2:

> "The provisions of this section . . . shall not apply to a motion picture operator or projectionist . . . . " (Appendix pp. 3 and 4.)

Whenever a legislative classification, such as the one in Section 311.2(b), affects fundamental interests, that classification must withstand strict judicial scrutiny to be upheld against a challenge to its validity based upon the equal protection clause. See generally, *Developments in the Law–Equal Protection,* 82 HARV. L. REV., 1065 (1969). (Hereinafter cited *Developments.*) Thus, where a legislative enactment seeks to treat two classes of persons differently, and that treatment affects a fundamental right, the normal presumption of the validity of statutes does not pertain, and the statute in question must be viewed in a critical manner by the courts, to determine whether it should stand or fall. *Dunn vs. Blumstein,* 405 U.S. 330 (1972); *Levy vs. Louisianna,* 391 U.S. 68 (1968); *Skinner vs. Oklahoma,* 315 U.S. 535 (1942).

While this Court has never cataloged the fundamental interests which give rise to the "strict scrutiny" test, the breadth of those rights is at least as great as that of the fundamental rights guaranteed by the due process clause, see Henkin, *Selective Incorporation in the Fourteenth Amendment,* 73 YALE L. J., 74 (1963); *Developments, supra,* 82 HARV. L. REV. at 1130, and includes the rights guaranteed by the Bill of Rights. *San Antonio School District vs. Rodri-*

*guez*, 411 U.S. 1, 33 (1973).

There are two reasons why strict scrutiny of Section 311.2 is required: Because it affects the right to freedom of expression, *Chicago Police Department vs. Mosley*, 408 U.S. 92 (1972), and because it is a penal statute which affects the liberty, protected by the due process clause, *San Antonio School District vs. Rodriguez, supra*, 411 U.S. at 61 n. 8 (Stewart, J., concurring).

In *Mosley*, the Court made clear what has often been assumed: That where an ordinance is one "affecting First Amendment freedoms," it is subject to strict judicial scrutiny. *Chicago Police Department vs. Mosley, supra*, 408 U.S. at 101. Penal Code Section 311.2, of course, affects First Amendment freedoms, and the exception to its operation set forth in subsection (b) must therefore be carefully scrutinized.

The second reason that strict scrutiny is called for is that Section 311.2 is a penal statute affecting the liberty of persons alleged to have violated it. Every person charged with a crime has the right to be treated in the same way as any other person charged with that crime. *Mayer vs. Chicago*, 404 U.S. 189 (1971); *Douglas vs. California*, 372 U.S. 353 (1963); *Griffin vs. Illinois*, 351 U.S. 12 (1956). And any exception to the operation of a penal law must withstand strict scrutiny. The exception provided by Penal Code Section 311.2(b) cannot.

It is clear that there are other persons equally entitled to an exemption from the application of Penal Code Section 311.2 as are projectionists. For example, a clerk in a bookstore with no financial interest in that store is no more culpable than the projectionist in a movie theatre. Nor,

appellants would submit, is the usher in that theatre or the person taking tickets. There is no basis at all,[3] and surely none that can withstand strict judicial scrutiny, for the distinction made in Section 311.2(b).

Where, as here, the strict scrutiny standard applies, the state must demonstrate that the law in question is "*necessary* to promote a *compelling* governmental interest." *Dunn vs. Blumstein, supra,* 405 U.S. at 342; *Shapiro vs. Thompson,* 394 U.S. 618, 634 (1969). Statutes affecting fundamental rights must be drawn with "precision," *NAACP vs. Button,* 371 U.S. 415, 438 (1963) and must use the least drastic means possible to achieve their goal. *Shelton vs. Tucker,* 364 U.S. 479, 488 (1960).

It is clear that the decision of the California Legislature to exempt projectionists from the operation of Section 311.2 cannot be supported. The statute is therefore unconstitutional in that it violates the equal protection clause of the Fourteenth Amendment to the Constitution. *Cf.* comment, *The Right To Non-discriminatory Enforcement of State Penal Laws,* 61 COLUM. L. REV., 1103 (1961); *Yick Wo vs. Hopkins,* 118 U.S. 356 (1886).

Appellant's second contention regarding the denial of "equal protection" involves Article VI, Section 14, of the California Constitution. Article VI, Section 14 requires that certain appellate courts provide written

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[3]Even if the "strict scrutiny" test were not called for, the lesser "rational basis test" could not be met, for there is no substantial relationship between the exception provided for in Section 311.2(b) and an actual legislative purpose. *Rinaldi vs. Yeager,* 384 U.S. 305 (1966); Gunther, *A Model For A New Equal Protection,* 86 HARV. L. REV., 1 (1972).

opinions, while other appellate courts need not:

> "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." (Appendix p. 3.)

Essentially, Article VI, Section 14 requires written opinions on appeals from felony convictions[4] but not from misdemeanor convictions, without regard to the sentence imposed. A person convicted of a felony but not sentenced to serve time in custody is entitled to a written opinion, as is a person convicted in the Superior Court and given a misdemeanor sentence, while a person convicted of one or more misdemeanors in the Municipal Court is not entitled to a written opinion by the reviewing court (the Appellate Department of the Superior Court), even if he is sentenced to serve one or more[5] years in custody.

It is appellants' contention that the failure of Article VI, Section 14 to require written opinions by the Appellate Department of the Superior Court denies them equal protection of the law, for it prevents meaningful appellate review of Appellate Department judgments, see, *United States vs. El Paso Natural Gas Company,* 376 U.S.

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[4]Both the Supreme Court and Courts of Appeal also hear appeals from misdemeanor convictions, both those which arise in the Superior Court (misdemeanors by sentence – California Penal Code Section 17) and those which begin in the Municipal Court and are later transferred to the Court of Appeal for decision by the Appellate Department of the Superior Court.

[5]While a misdemeanor cannot be punished by a period of incarceration in the county jail for more than one year (California Penal Code Section 17), where there is more than one count, a Municipal Court judge may sentence a defendant to serve more than one year in jail by sentencing him to serve consecutive sentences.

651, 656-57 (1964); *SEC vs. Chenery Corp.*, 318 U.S. 80, 94 (1943); K. Davis, ADMINISTRATIVE LAW TREATISE, § 16.00 *et seq.* at 559 (Supp. 1970), without regard to whether the appellant involved was sentenced to serve time in custody or not. *Cf. Argersinger vs. Hamlin*, 407 U.S. 25, 37 (1972).

Appellants feel that since criminal appeals involve a fundamental interest, Gunther, *Forward, Supreme Court 1971 Term*, 86 HARV. L. REV., 1, 9 (1972); see *Griffin vs. Illinois*, 351 U.S. 12 (1956), the "strict scrutiny" test must be applied to Article VI, Section 14. Thus, there must be procedures which allow no invidious discrimination between persons who should be treated equally. *Griffin vs. Illinois, supra*, 351 U.S. at 17. The distinction here cannot survive strict scrutiny, for the only state interest involved is a fiscal one, one which cannot tip the balance enough to support a determination that Article VI, Section 14 is valid. *Mayer vs. Chicago, supra*, 404 U.S. at 197. The right to an opinion is too important a right to allow for its elimination in cases, such as this one, where appellants face incarceration should their appeal fail. See *Morrissey vs. Brewer*, 408 U.S. 471, 489 (1972).

Assuming, however, that the strict scrutiny test does not apply, the difference in treatment allowed by Article VI, Section 14 cannot even meet the lesser "rational basis" standard, *F. S. Royster Guano Co. vs. Virginia*, 253 U.S. 412 (1920); *Developments, supra*, 82 HARV. L. REV. at 1077, for the distinction between felonies and misdemeanors is an "unreasoned" distinction. *Mayer vs. Chicago, supra*, 404 U.S. at 196; see *Groppi vs. Wisconsin*, 400 U.S. 505 (1971). Avenues of appellate review must be kept free of

such unreasoned distinctions, for they can only impede free access to the courts.[6] *Rinaldi vs. Yeager*, 384 U.S. 305, 310 (1966). The distinction allowed by Article VI, Section 14, between persons tried in the Municipal Court and those tried in the Superior Court, cannot survive judicial inquiry: it violates appellants' right to equal protection.

**The First Amendment Issue:**

In *Miller vs. California*, 413 U.S. 15, 24-27 (1973), this Court set forth specific guidelines limiting the scope of obscenity regulation:

> "[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

Regulation, according to *Miller*, must be limited to:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and

(b) Patently offensive representations or

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[6] In addition, it should be pointed out that opinions void needless litigation. *Phelps Dodge Corp. vs. N.L.R.B.*, 313 U.S. 177, 197 (1941); see *California vs. Krivda*, 409 U.S. 33, 35 (1972); *Mental Hygiene Dept. vs. Kirchner*, 380 U.S. 194, 196-97 (1965).

depictions of masturbation, excretory functions and lewd exhibitions of the genitals.

When viewed in light of *Miller*, it is clear that California Penal Code Section 311.2, on its face, does not meet the requirements set forth by this Court with regard to specific description of prohibited activity. Obviously, the kind of specific description required is not included in the statute itself, which is merely worded in the general phrasing of the *Roth* test. Thus, unless the statute has been authoritatively construed to apply to specific sexual acts, Penal Code Section 311.2 is unconstitutional. Appellants submit that Penal Code Section 311.2 has not been authoritatively construed by the California courts.

There are only three decisions of the California Supreme Court dealing with the construction of Penal Code Section 311.2.[7] They are *Zeitlin vs. Arnebergh*, 59 Cal. 2d 901 (1963); *People vs. Noroff*, 67 Cal. 2d 791 (1967); and *In re Panchot*, 70 Cal. 2d 105 (1968). None of these cases purports to define the kind of sexual activity which must be depicted in order to violate the statute. None of them does anything more than to decide whether the material before the court was obscene as defined by Penal Code Section 311.2. There was no attempt to set forth examples of conduct which *is* obscene. There was no construction of Penal Code Section 311.2.

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[7]The Supreme Court's other obscenity cases clearly do not construe Section 311.2. *Aday vs. Superior Court*, 55 Cal. 2d 789 (1961) [invalid search warrant]; *Flack vs. Municipal Court*, 66 Cal. 2d 981 (1967) [warrantless seizure]; *Burton vs. Municipal Court*, 68 Cal. 2d 684 (1968) [motion picture licensing ordinance]; *In re Giannini*, 69 Cal. 2d 563 (1968) [Penal Code Section 314]; *Barrows vs. Municipal Court*, 1 Cal. 3d 821 (1970) [theatres with live performances not included within Penal Code Section 311.6]; *People vs. Luris*, 4 Cal. 3d 84 (1971) [probable cause]; *Perrine vs. Municipal Court*, 5 Cal. 3d 656 (1971) [bookstore ordinance].

## CONCLUSION

It is submitted that both California Penal Code Section 311.2 and California Constitution Article VI, Section 14 are unconstitutional for the reasons stated above. Appellants feel that the questions presented by this jurisdictional statement are substantial, that they are of public importance, and that they merit a full review, with briefs by both sides, before this Court.

Respectfully submitted

BURTON MARKS

STEPHEN GILBERT

*Attorneys for Appellants*

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In the Appellate Department, Superior Court of the State of California, County of Orange.

NO. APS-1697 - 1714.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. NATHAN PENDLETON, VALENTINO RODRIQUEZ, MYRON CURDY, ETC., ET AL., Defendants and Appellants.

FILED MARCH 4, 1975

On Appeal from the Municipal Court of the Central Orange County Judicial District, Hon. Philip E. Schwab, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the judgments of conviction for violation of Penal Code Section 311.2 made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby affirmed, and the cause is remanded to the Municipal Court for further proceedings.

Dated this 4th day of March, 1975.

W. CHARAMZA, Judge

KNEELAND, Judge

JUDGE, Presiding Judge

## MINUTE ORDER OF MARCH 12, 1975

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M., March 12, 1975, present Hon. KNEELAND, J.; Hon. CHARAMZA, J.; Hon. JAMES F. JUDGE, Presiding Judge; H J. Gallagher, Deputy Clerk; . . . . , Deputy Sheriff; . . . . , Reporter, and the following proceedings were had:

AP-1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714.

PEOPLE vs. PENDLETON, ET AL.

Petition for Rehearing/Certification to Court of Appeal and Application and Order for Stay of Mandate Pending Appeal/Certiorari having been timely filed and the Court having considered the Petitions and review the record; does now rule, the Petitions and each of them are hereby denied.

ENT. 3-12-75

## STATUTES

**CALIFORNIA CONSTITUTION:**

**Article VI**

**§ 14. Publication of opinions; decisions of Supreme Court and courts of appeal.**

Sec. 14. The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

**CALIFORNIA PENAL CODE:**

**§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state.**

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to

the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

**§ 311. Definitions.**

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter

is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

* * *

STATE OF CALIFORNIA )
)
County of Orange ) ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on SEPTEMBER , 1975, I served the within JURISDICTIONAL STATEMENT (PENDLETON, et al. vs. PEOPLE OF THE STATE OF CALIFORNIA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Appellate Department
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)

District Attorney
County of Orange
700 Civic Center Drive West
Santa Ana, California 92701
(2 copies)

Attorney General
State of California
5006 State Building
1350 Front Street
San Diego, Ca. 92101
(1 copy)

Municipal Court of the
Central Orange County Judicial Dist.
700 Civic Center Drive West
Santa Ana, California 92701
(1 copy)
For: Hon. Philip E. Schwab, Judge

I declare under peanlty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER , 1975, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

**Dean-Standefer, 326½ Main Street, Huntington Beach, Ca.**
**(714) 536-7161**